

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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DEC 19 2011  
FCC Mail Room

In the Matter of	)	
	)	
National Environmental Policy Act Compliance for	)	WT Docket No. 08-61
Proposed Tower Registrations	)	
	)	
Effects of Communications Towers	)	WT Docket No. <u>03-187</u>
On Migratory Birds	)	
	)	

### ORDER ON REMAND

Adopted: December 6, 2011

Released: December 9, 2011

By the Commission: Commissioner Copps issuing a statement.

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## I. INTRODUCTION

1. In this Order, we take procedural measures to ensure, consistent with the Commission's obligations under federal environmental statutes, that the environmental effects of proposed communications towers, including their effects on migratory birds, are fully considered prior to construction. We institute a pre-application notification process so that members of the public will have a meaningful opportunity to comment on the environmental effects of proposed antenna structures that require registration with the Commission. As an interim measure pending completion of a programmatic environmental analysis and subsequent rulemaking proceeding, we also require that an Environmental Assessment (EA) be prepared for any proposed tower over 450 feet in height. Through these actions and our related ongoing initiatives, we endeavor to minimize the impact of communications towers on migratory birds while preserving the ability of communications providers rapidly to offer innovative and valuable services to the public.

2. Our actions today respond to the decision of the Court of Appeals for the District of Columbia Circuit in *American Bird Conservancy v. FCC*.<sup>1</sup> In *American Bird Conservancy*, the court held that our current antenna structure registration (ASR) procedures impermissibly fail to offer members of the public a meaningful opportunity to request an EA for proposed towers that the Commission considers categorically excluded from review under the National Environmental Policy Act (NEPA).<sup>2</sup> The notification process that we adopt today addresses that holding of the court. In addition, the court held that the Commission must perform a programmatic analysis of the impact on migratory birds of registered antenna structures in the Gulf of Mexico region.<sup>3</sup> The Commission is already responding to this holding by conducting a nationwide environmental assessment of the ASR program. The Commission has also asked the U.S. Fish and Wildlife Service (FWS) to perform a conservation review of the ASR program under the Endangered Species Act (ESA).<sup>4</sup>

3. Today's action also occurs in the context of our ongoing rulemaking proceeding addressing the effects of communications towers on migratory birds. In 2006, the Commission sought comment on what this impact may be and what requirements, if any, the Commission should adopt to ameliorate it.<sup>5</sup> Evidence in the record of that proceeding and in the record compiled for the programmatic EA indicates, among other things, that the likely impact of towers on migratory birds increases with tower height. Consistent with that evidence and with a Memorandum of Understanding among representatives of communications providers, tower companies, and conservation groups,<sup>6</sup> we require, as an interim measure, that an EA be prepared for any proposed tower over 450 feet in height. We expect to take final action in the Migratory Birds proceeding following completion of the programmatic EA and, if necessary, any subsequent programmatic Environmental Impact Statement (EIS).

4. Specifically, we take the following actions in this Order:

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<sup>1</sup> 516 F.3d 1027 (D.C. Cir. 2008) (*American Bird Conservancy*).

<sup>2</sup> *Id.* at 1035 (citing NEPA, 42 U.S.C. § 4321 *et seq.*).

<sup>3</sup> *Id.* at 1033-34.

<sup>4</sup> 16 U.S.C. § 1531 *et seq.*

<sup>5</sup> In the Matter of Effects of Communications Towers on Migratory Birds, WT Docket No. 03-187, *Notice of Proposed Rulemaking*, 21 FCC Rcd 13241 (2006) (*Migratory Birds NPRM* or *Migratory Birds proceeding*).

<sup>6</sup> Memorandum of Understanding Concerning Interim Antenna Structure Registration Standards, submitted May 4, 2010 (MOU). The MOU is signed by the Infrastructure Coalition, consisting of CTIA—The Wireless Association, the National Association of Broadcasters, PCIA—The Wireless Infrastructure Association and the National Association of Tower Erectors (Infrastructure Coalition), and by the Conservation Groups, consisting of the American Bird Conservancy, Inc., Defenders of Wildlife, and the National Audubon Society (Conservation Groups).



- We require that prior to the filing of a completed ASR application for a new antenna structure, members of the public be given an opportunity to comment on the environmental effects of the proposal. The applicant will provide notice of the proposal to the local community and the Commission will post information about the proposal on its website. Commission staff will consider any comments received from the public to determine whether an EA is required for the tower.
- Environmental notice will also be required if an ASR applicant changes the lighting of an existing tower to a less preferred lighting style.
- We modify our procedures so that EAs for those registered towers that require EAs will also be filed and considered prior to the ASR application. Those EAs are currently filed together with either the ASR application or a service-specific license or permit application.
- We institute an interim procedural requirement that an EA be filed for all proposed registered towers over 450 feet in height. Staff will review the EA to determine whether the tower will have a significant environmental impact. This processing requirement is an interim measure pending completion of the ongoing programmatic environmental analysis of the ASR program.

5. In light of our adoption of an environmental notification process that provides a meaningful opportunity for the public to raise environmental concerns as to prospective ASR applications, together with our commencement of the programmatic EA, we grant in part and dismiss in part the petitions for expedited rulemaking filed in WT Docket No. 08-61 in response to the court's decision.<sup>7</sup> To the extent that this Order adopts a notification process for prospective ASR applications and otherwise responds to concerns raised by the court, the Petitions are granted in part. Insofar as the Petitions seek relief beyond the scope of this Remand Order, they are dismissed without prejudice. Either Petition may be refiled to seek relief on any issues that may remain relevant following completion of the programmatic NEPA analysis.

## II. BACKGROUND

### A. NEPA and CEQ Rules

6. NEPA requires all federal agencies, including the FCC, to identify and take into account environmental effects when deciding whether to authorize or undertake a major federal action. Although NEPA does not impose substantive requirements upon agency decision-making, Title I requires federal agencies to take a "hard look" at proposed major federal actions that may have significant environmental consequences and to disseminate relevant information to the public.<sup>8</sup> Specifically, Section 102(2)(C) of NEPA requires the preparation of a detailed EIS for any "major Federal action[]" significantly affecting

<sup>7</sup> Pending before the Commission are: (a) Petition for Expedited Rulemaking, filed May 2, 2008, by CTIA—The Wireless Association, National Association of Broadcasters, National Association of Tower Erectors, and PCIA—The Wireless Association (Infrastructure Coalition), filed May 2, 2008 (Infrastructure Coalition Petition); and (b) Petition for Expedited Rulemaking and Other Relief, filed April 14, 2009, by American Bird Conservancy, Defenders of Wildlife and National Audubon Society (Conservation Groups) filed April 14, 2009 (Petition). Both Petitions requested, in part, that the Commission adopt rules to carry out the mandate of the court.

<sup>8</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989).

the quality of the human environment. ...”<sup>9</sup> In preparing the EIS, the action agency must consult with any other federal agency with jurisdiction or expertise over any environmental impact involved.<sup>10</sup>

7. Section 204 of NEPA created the Council on Environmental Quality (CEQ) and entrusted it with oversight responsibility regarding the NEPA activities of federal agencies.<sup>11</sup> To implement Section 102(2) of NEPA, CEQ promulgated regulations, 40 C.F.R. Parts 1500-1508, that “tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act.”<sup>12</sup> These regulations are “applicable to and binding on all Federal agencies for implementing the procedural provisions of [NEPA] ... except where compliance would be inconsistent with other statutory requirements.”<sup>13</sup> Thus, as mandated by NEPA, each federal agency issues its own regulations and procedures that implement its NEPA responsibility to identify and account for the environmental impacts of projects it undertakes or authorizes.<sup>14</sup> Such regulations must follow the requirements specified in CEQ regulations.<sup>15</sup>

8. CEQ’s regulations direct agencies to identify their major federal actions as falling into one of three categories.<sup>16</sup> The first such category encompasses those actions that normally have a significant environmental impact. These actions always require an EIS.<sup>17</sup> A second category of agency actions includes those actions that ordinarily may have a significant environmental impact. For actions in this category, an agency may conduct an EA in lieu of an EIS.<sup>18</sup> An EA is briefer than an EIS, and its purpose is to determine whether an EIS is required.<sup>19</sup> If an EA shows that a proposed action will have no

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<sup>9</sup> 42 U.S.C. § 4332(2)(C).

<sup>10</sup> *Id.*

<sup>11</sup> 42 U.S.C. § 4344.

<sup>12</sup> 40 C.F.R. § 1500.1(a).

<sup>13</sup> 40 C.F.R. § 1500.3.

<sup>14</sup> 42 U.S.C. § 4332(2)(B) (“[A]ll agencies of the federal government shall ... (B) identify and develop procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations.”).

<sup>15</sup> 40 C.F.R. §§ 1507.1 (“All agencies of the Federal Government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by § 1507.3 to the requirements of other applicable laws.”), 1507.3 (“Each agency shall consult with the Council while developing its procedures. ... The[se] procedures shall be adopted [and revised] only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations.”).

<sup>16</sup> *See* 40 C.F.R. § 1507.3(b)(2).

<sup>17</sup> An EIS is a detailed statement by the responsible federal official on: “(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.” 42 U.S.C. § 4332(2)(C). *See also* 40 C.F.R. § 1508.11.

<sup>18</sup> 47 C.F.R. § 1.1307. *See also* 47 C.F.R. § 1.1308(b) (“The EA is a document which shall explain the environmental consequences of the proposal and set forth sufficient analysis for the Bureau or the Commission to reach a determination that the proposal will or will not have a significant environmental effect.”); 47 C.F.R. § 1.1311(a) (information to be included in an environmental assessment).

<sup>19</sup> Pursuant to CEQ’s regulations, an environmental assessment is a document that: (1) discusses the need for a proposed action, the alternatives, and the environmental impacts of the proposed action and alternatives; (2) lists the agencies and persons consulted; and (3) provides evidence and analysis for determining whether to prepare an (continued....)



significant environmental impact, then the agency issues a Finding Of No Significant Impact (FONSI),<sup>20</sup> and the proposed action can proceed. However, if an EA indicates that the action will have a significant environmental impact, the agency must proceed with the EIS process.

9. The third category of actions – “categorical exclusions” – are those actions agencies have identified “which do not individually or cumulatively have a significant effect on the human environment ... and for which ... neither an environmental assessment nor an environmental impact statement is required.”<sup>21</sup> CEQ regulations require that an agency that chooses to establish categorical exclusions must also provide for “extraordinary circumstances”<sup>22</sup> under which a normally excluded action may have a significant effect. CEQ regulations also state that an agency may decide, in its procedures or otherwise, to prepare EAs for specific reasons even when not required to do so.<sup>23</sup> Thus, although categorically excluded actions presumptively are exempt from environmental review, agency decisions or “extraordinary circumstances” may require their review in the form of the preparation of EAs or EISs.<sup>24</sup>

10. One of NEPA’s central goals is to facilitate public involvement in agency decisions that may affect the environment.<sup>25</sup> Section 1506.6 of CEQ’s regulations governs public involvement in federal agencies’ implementation of NEPA.<sup>26</sup> Section 1506.6(a) provides generally that agencies shall “make diligent efforts to involve the public in preparing and implementing their NEPA procedures.”<sup>27</sup> Section 1506.6(b) specifically directs agencies to provide “public notice of ... the availability of environmental documents” to parties who may be interested in or affected by a proposed action.<sup>28</sup> Environmental documents include EAs, EISs, FONSIIs, and Notices of Intent (NOIs).<sup>29</sup> For actions “with effects primarily of local concern,”<sup>30</sup> Section 1506.6(b)(3) suggests nine ways of providing local public notice, while Section 1506.6(b)(2) discusses methods of providing notice for actions “with effects of national concern.”<sup>31</sup> In a memorandum to agencies, the CEQ has explained that “[a] combination of

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environmental impact statement or a finding of no significant impact. 40 C.F.R. § 1508.9. *See also* 40 C.F.R. § 1501.4(b).

<sup>20</sup> *See* 40 C.F.R. § 1508.13.

<sup>21</sup> *See* 40 C.F.R. § 1507.3(b)(2)(ii). *See also* 40 C.F.R. § 1508.4 (definition of categorical exclusion).

<sup>22</sup> *See* 40 C.F.R. § 1508.4.

<sup>23</sup> *Id.*

<sup>24</sup> 40 C.F.R. §§ 1508.4, 1507.3(b)(1).

<sup>25</sup> 40 C.F.R. §§ 1500.1(b), 1500.2(d) (“Federal agencies shall to the fullest extent possible ... encourage and facilitate public involvement in decisions which affect the quality of the human environment.”); *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 349 (“The statutory requirement that a federal agency contemplating a major action prepare such an [EIS] ... guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.”).

<sup>26</sup> 40 C.F.R. § 1506.6.

<sup>27</sup> 40 C.F.R. § 1506.6(a).

<sup>28</sup> 40 C.F.R. § 1506.6(b).

<sup>29</sup> 40 C.F.R. § 1508.10; *see also* 40 C.F.R. § 1508.22 (describing a Notice of Intent that an EIS will be prepared and considered).

<sup>30</sup> 40 C.F.R. § 1506.6(b)(3).

<sup>31</sup> 40 C.F.R. §§ 1506.6(b)(2), (b)(3). *See also Environmental Coalition of Ojai v. Brown*, 72 F.3d 1411 (9th Cir. 1995).



methods may be used to give notice, and the methods used should be tailored to the needs of particular cases.”<sup>32</sup>

## B. The Commission’s NEPA Process.

11. *The NEPA Rules.* CEQ has approved the Commission’s rules implementing NEPA, 47 C.F.R. §§ 1.1301-1.1319.<sup>33</sup> These rules apply to the processing of antenna structure registration applications, which the Commission has deemed to constitute a major federal action.<sup>34</sup> Consistent with CEQ regulations, the Commission’s current environmental procedures: (1) require preparation of an EIS for any proposed action deemed to significantly affect the quality of the human environment;<sup>35</sup> (2) require preparation of an EA for any proposed action that may have a significant environmental effect,<sup>36</sup> and (3) categorically exclude from environmental processing proposed actions deemed individually and cumulatively to have no significant environmental effect.<sup>37</sup>

12. Sections 1.1307(a) and (b) of the Commission’s existing rules identify those types of communications facilities that may significantly affect the environment and for which applicants must always prepare an EA that must be evaluated by the Commission as part of its decision-making process. These include facilities in officially designated wilderness areas or wildlife preserves, facilities that may affect threatened or endangered species or critical habitats, and other enumerated types of facilities that may significantly affect the environment.<sup>38</sup> Thus, Commission licensees and applicants must currently

<sup>32</sup> *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026-01 (Mar. 23, 1981).

<sup>33</sup> *See In the Matter of Petition by Forest Conservation Council, American Bird Conservancy and Friends of the Earth for National Environmental Policy Act Compliance, Memorandum Opinion and Order*, 21 FCC Rcd 4462, 4468, ¶ 18 (2006) (citing Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality, *Report and Order*, 60 Rad. Reg. 2d (P & F) 13, FCC 85-626, ¶ 3 (rel. Mar. 26, 1986)).

<sup>34</sup> *In the Matter of Streamlining the Commission’s Antenna Structure Clearance Procedure, Report and Order*, 11 FCC Rcd 4272, 4289 ¶ 41 (1995) (finding that the registration of an antenna structure constitutes a major federal action subject to NEPA) (*Antenna Structure Clearance R&O*). *Accord*, *In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, Report and Order*, 20 FCC Rcd 1073, 1084 ¶ 27 (2004), *aff’d sub nom. CTIA-Wireless Ass’n v. FCC*, 466 F.3d 105 (2006) (explaining that the Commission’s treatment of tower registrations as federal undertakings within the meaning of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, is a permissible interpretation in light of the preconstruction approval process that it has implemented to assure that communications towers are not a risk to air safety under Section 303(q) of the Communications Act).

<sup>35</sup> 47 C.F.R. §§ 1.1305, 1.1314, 1.1315, 1.1317. The Commission has found no common pattern that would enable it to specify actions that automatically require an EIS. 47 C.F.R. § 1.1305.

<sup>36</sup> 47 C.F.R. § 1.1307. *See also* 47 C.F.R. § 1.1308(b)(3) (“The EA is a document which shall explain the environmental consequences of the proposal and set forth sufficient analysis for the Bureau or the Commission to reach a determination that the proposal will or will not have a significant environmental effect.”); 47 C.F.R. § 1.1311 (information to be included in an environmental assessment).

<sup>37</sup> 47 C.F.R. § 1.1306.

<sup>38</sup> Section 1.1307(a) specifies that Commission actions with respect to the following types of facilities may significantly affect the environment: (1) facilities that are to be located in an officially designated wilderness area; (2) facilities that are to be located in an officially designated wildlife preserve; (3) facilities that may affect listed threatened or endangered species or designated critical habitats, or are likely to jeopardize the continued existence of any proposed threatened or endangered species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of Interior; (4) facilities that may affect historic properties listed or eligible for listing on the National Register of Historic Places; (5) facilities that may affect Indian religious sites; (6) facilities that are to be located in a flood plain; (7) facilities whose construction will involve significant change in surface features; and (8) antenna towers or structures equipped with high intensity white lights that are to (continued....)



ascertain, prior to construction or application for Commission authorization or approval, whether their proposed facilities may have any of the specific environmental effects identified in these rules.<sup>39</sup> The rules currently do not identify facilities that may affect migratory birds as requiring preparation of an EA.<sup>40</sup>

13. Under the existing rules, actions not within the categories for which EAs are required under Sections 1.1307(a) and (b) of the Commission's rules "are deemed individually and cumulatively to have no significant effect on the quality of the human environment and are categorically excluded from environmental processing ... [e]xcept as provided in Sections 1.1307(c) and (d)."<sup>41</sup> Under Sections 1.1307(c) and (d), the agency shall require an EA if it determines that an otherwise categorically excluded action may have a significant environmental impact.<sup>42</sup> Thus, even though a potentially significant effect on migratory birds is not one of the categories of proposed actions identified in Section 1.1307(a) of the rules as requiring an EA,<sup>43</sup> the Commission has on several occasions considered the impact of particular proposed construction projects on migratory birds,<sup>44</sup> and in appropriate circumstances has required modifications to protect them.<sup>45</sup>

14. *NEPA Review for Towers Subject to ASR.* Section 303(q) of the Act vests the Commission with authority to require the painting and/or lighting of radio towers if and when in its judgment such structures constitute, or there is a reasonable possibility that they may constitute, a menace

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be located in residential neighborhoods, as defined by applicable zoning law. 47 C.F.R. § 1.1307(a). Under Section 1.1307(b), a Commission action granting a construction permit, license to transmit (including a renewal of a license to transmit), equipment authorization, or modification in existing facilities requires preparation of an EA if the proposed facility, operation, or transmitter would cause human exposure to radiofrequency radiation in excess of the limits specified in 47 C.F.R. §§ 1.1310 and 2.1093. 47 C.F.R. § 1.1307(b).

<sup>39</sup> 47 C.F.R. § 1.1308. *See also* 47 C.F.R. § 1.1312 (requiring Commission applicants and licensees to perform environmental review of proposed actions requiring no other preconstruction Commission authorization).

<sup>40</sup> We note, however, that licensees and applicants must consider effects on migratory birds that are listed or proposed as endangered or threatened species under the ESA. 47 C.F.R. § 1.1307(a)(3). In *American Bird Conservancy*, the court vacated the Commission's refusal to initiate formal Section 7 ESA consultation with FWS with respect to the impact of the Commission's ASR decisions on endangered and threatened species in the Gulf Coast region. 516 F.3d at 1034-35. As discussed below, we are addressing this holding through a conservation review by FWS.

<sup>41</sup> 47 C.F.R. § 1.1306(a). Thus, most antenna structure registrations are categorically excluded from environmental processing. Out of 2,527 tower registrations granted in 2010 for newly constructed towers, 69 were filed with EAs on Form 854. This may somewhat understate the total number of EAs because some EAs were filed with the associated service-specific application.

<sup>42</sup> *See* 47 C.F.R. §§ 1.1307(c), 1.1307(d); In the Matter of Public Employees for Environmental Responsibility, *Order*, 16 FCC Rcd 21438, 21441 ¶ 3 (2001). These provisions satisfy Section 1508.4 of CEQ's rules, 40 C.F.R. § 1508.4, requiring that "[a]ny [categorical exclusion] provisions shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect."

<sup>43</sup> *See* 47 C.F.R. § 1.1307(a).

<sup>44</sup> *E.g.*, In the Matter of County of Leelanau, Michigan, *Memorandum Opinion and Order*, 9 FCC Rcd 6901, 6903 ¶ 8 & n.11 (1994) (*Leelanau*); Caloosa Television Corp., *Memorandum Opinion and Order*, 3 FCC Rcd 3656, 3658 ¶ 11 (1988), *recon. denied*, 4 FCC Rcd 4762 (1989); In the Matter of T-Mobile and the Pierce Archery Proposed Antenna Tower, *Memorandum Opinion and Order*, 18 FCC Rcd 24993, 24997 ¶ 13 (WTB Spectrum & Comp. Policy Div. 2003); Letter from Linda Blair, Mass Media Bur., FCC, to Tanja L. Kozicky, 11 FCC Rcd 4163, 4166 (MMB Aud. Serv. Div. 1996); In re Application of Baltimore County, Maryland, *Memorandum Opinion and Order*, 4 FCC Rcd 5068, 5071 ¶¶ 23-25 (1989), *review denied*, 5 FCC Rcd 5615 (1990).

<sup>45</sup> *See Leelanau*, 9 FCC Rcd at 6905 ¶ 17.

to air navigation.<sup>46</sup> To implement this provision, Part 17 of the Commission's rules requires that, if notification of proposed construction must be provided to the Federal Aviation Administration (FAA) under its rules, then such proposed antenna structures or modifications to antenna structures must also be registered in the Commission's ASR System prior to construction.<sup>47</sup> Notification to the FAA is generally required for any antenna structure that is over 200 feet in height above ground level or that meets certain other criteria, such as proximity to an airport runway.<sup>48</sup> Before the antenna structure is registered with the FCC, the tower owner must obtain a No Hazard to Air Traffic Determination (No Hazard Determination) from the FAA.<sup>49</sup> The Commission has determined that the process of FAA clearance and FCC registration effectively constitutes a pre-construction approval process within the Commission's Section 303(q) authority and is therefore subject to the provisions of NEPA and other federal environmental statutes.<sup>50</sup>

15. To register an antenna structure, the antenna structure owner must submit to the Commission a valid ASR application (FCC Form 854, Application for Antenna Registration), along with the No Hazard Determination from the FAA.<sup>51</sup> Because the FCC's approval of an application to register and construct an antenna structure is a major federal action, the tower owner must certify in response to current Question 38 on Form 854<sup>52</sup> whether the proposed antenna structure may have a significant environmental effect, as defined by Sections 1.1307(a) and (b) of the rules, for which an EA must be prepared.<sup>53</sup> The Commission will not process an ASR application if Question 38 is not answered. A "no" answer signifies that none of the circumstances delineated in Sections 1.1307(a) and (b) of the Commission's rules apply to the proposed tower and that an EA is not required to be submitted with the application. In that event, the ASR system verifies against the FAA's database the accuracy of the lighting and marking specifications provided by the applicant. The ASR system then issues an antenna structure registration (Form 854R) without the Commission having provided prior public notice of the pending ASR application.

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<sup>46</sup> 47 U.S.C. § 303(q).

<sup>47</sup> 47 C.F.R. § 17.4(a). The FAA's notification requirements are contained in 14 C.F.R. §§ 77.13-17, *reprinted in* FAA Form 7460-1, "Notice of Proposed Construction or Alteration."

<sup>48</sup> 14 C.F.R. § 77.13; 47 C.F.R. § 17.7.

<sup>49</sup> The applicant provides the FAA with the structure height and location by filing a Notice of Proposed Construction or Alteration (FAA Form 7460-1). *See also* 14 C.F.R. § 77.17 (FAA regulation governing form and time of notice). The FAA sends an acknowledgement to the antenna structure owner that constitutes a determination of no hazard to air navigation, meaning that the structure will pose no hazard to aircraft if the structure is marked and/or lighted consistent with the FAA's recommendations. 14 C.F.R. § 77.19. The antenna structure registration (FCC Form 854R) ultimately issued by the Commission will typically incorporate the FAA's lighting and/or marking recommendations, meaning that the antenna structure owner must ensure that the registered antenna structure complies with the lighting/marking specified in the registration.

<sup>50</sup> *Antenna Structure Clearance R&O*, 11 FCC Rcd at 4289 ¶ 41. *Accord*, In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, *Report and Order*, 20 FCC Rcd 1073, 1084 ¶ 27 (2004), *aff'd sub nom. CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105 (D.C. Cir. 2006).

<sup>51</sup> 47 C.F.R. § 17.4(b) (providing that the FAA's determination of no hazard must not have expired by the time the ASR application is received by the Commission).

<sup>52</sup> We will refer to this question as "Question 38," but we note that it may not necessarily have the same number in the revised form that will be promulgated to implement today's rule changes.

<sup>53</sup> FCC Form 854, Question 38 ("Would a Commission authorization for this location be an action, which may have a significant environmental effect? *See* 47 C.F.R. § 1.1307. If 'Yes,' submit an environmental assessment as required by 47 C.F.R. Sections 1.1308 and 1.1311.").



16. If the response to Question 38 is “yes,” the applicant must submit an EA, along with supporting documentation, when it files the ASR application with the Commission. This means that the application will not be processed until the Bureau has resolved the environmental concerns addressed in the EA.<sup>54</sup> Such an application is placed on public notice for thirty (30) days, by publication of a notice in the Daily Digest. This process affords interested persons an opportunity to comment on the EA and also, pursuant to Section 1.1307(c), to seek environmental review with respect to effects, such as impact on migratory birds, that do not routinely require preparation of an environmental assessment.

17. Under the Commission’s rules, applicants for some proposed towers may be required not only to file an ASR application but also to file service-specific applications. For example, applicants for certain public safety and wireless radio service facility authorizations may be required to file both an ASR application and a site-by-site license application. The license application (Form 601, Application for Wireless Telecommunications Bureau Radio Service Authorization) may be placed on public notice pursuant to the Commission’s licensing rules. To date, those applicants have been permitted to choose whether to attach any required EA to FCC Form 854 or FCC Form 601. Broadcast construction applicants are, on the other hand, required to submit the EA, if any is required, with the service-specific application and do not submit a copy of the EA with the associated FCC Form 854. Similarly, while pre-construction approval is generally not required for satellite earth stations, if an EA is required, the applicant must submit a service-specific application on FCC Form 312 (Application for Satellite Space and Earth Station Authorizations) and attach the EA to that application, which is then placed on 30-day public notice, prior to construction.<sup>55</sup>

18. *Towers Not Subject to ASR.* Licensees may also construct and use towers that do not require registration with the Commission. In the event an EA is required for one of these towers, it is filed with the appropriate license application and processed by the Bureau responsible for licensing that service. If a tower company that is not a licensee or license applicant wishes to construct a tower that does not require antenna structure registration, but does require an EA, that company typically registers the tower by filing an FCC Form 854 as a vehicle for submitting the EA. As noted below, this Order does not change processing procedures for towers that do not require ASR filings.

19. *Collocations.* Licensees are often able to collocate antennas on existing buildings or structures.<sup>56</sup> Because collocations are unlikely to have environmental effects, with limited exceptions they are not subject to environmental processing,<sup>57</sup> except upon a determination by the processing Bureau under Section 1.1307(c) or (d), based on its examination of a petition submitted by an interested person or its own motion, that the proposed collocation may significantly affect the environment.<sup>58</sup> As discussed below, the procedures adopted in this Order will apply only to certain collocations that may have a significant effect on migratory birds because they involve a substantial increase in size of a registered tower.

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<sup>54</sup> 47 C.F.R. § 17.4(c).

<sup>55</sup> 47 C.F.R. §§ 25.115, 25.151.

<sup>56</sup> Under the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 C.F.R. Pt. 1, App. B, collocation is defined as “the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.”

<sup>57</sup> 47 C.F.R. § 1.1306 (Note 1) (requiring environmental processing only with respect to potentially significant effects on historic preservation, Native American sites, and human exposure to levels of radiofrequency radiation in excess of prescribed limits). Additionally, most collocations are excluded from historic preservation review under Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f. See Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 C.F.R. Pt. 1, App. B.

<sup>58</sup> See 47 C.F.R. §§ 1.1307(c)-(d).

### C. The Gulf Petition and Litigation

20. *The Gulf Petition.* Alleging that the Gulf Coast is critically important for migratory birds, Forest Conservation Council, American Bird Conservancy, and Friends of the Earth (petitioners) filed in 2002 a “Petition for National Environmental Policy Act Compliance” asking the Commission to, *inter alia*: (1) implement public participation procedures set forth in 40 C.F.R. § 1506.6 by providing notice and opportunity to comment on all proposed ASR applications for the Gulf Coast region; (2) commence preparation of an EIS evaluating, analyzing, and mitigating the direct, indirect, and cumulative effects of all past, present and reasonably foreseeable antenna structure registrations on migratory birds in the Gulf Coast region; and (3) initiate formal Section 7 ESA consultation with FWS with respect to the impact of the Commission’s ASR decisions on endangered and threatened species in the Gulf Coast region.<sup>59</sup>

21. *The Gulf Memorandum Opinion and Order.* In its 2006 *Memorandum Opinion and Order* addressing the Gulf Petition, the Commission dismissed that petition in part and denied it in part.<sup>60</sup> Of relevance here, the Commission declined to implement new public notice procedures,<sup>61</sup> declined to commence a programmatic EIS,<sup>62</sup> and denied the request to initiate formal Section 7 consultation on the cumulative effects that towers in the Gulf Coast region have on endangered and threatened species.<sup>63</sup> The Commission also deferred to the ongoing Migratory Birds proceeding petitioners’ request that it take action under the Migratory Bird Treaty Act (MBTA)<sup>64</sup> to reduce intentional and unintentional takes of migratory birds.

22. *The American Bird Conservancy Decision.* In *American Bird Conservancy*, the court affirmed the Commission’s deferral of the MBTA issues already under consideration in the ongoing nationwide Migratory Birds proceeding. However, it vacated the NEPA and ESA portions of the *Gulf Memorandum Opinion and Order* as well as the Commission’s decision not to implement new public notice procedures.

23. First, the court rejected the Commission’s dismissal of petitioners’ request for an EIS. The court held that neither the lack of specific evidence concerning the impact of towers on the environment, nor the lack of consensus among scientists regarding the impact of communications towers on migratory birds, was sufficient to render a NEPA analysis unnecessary. Rather, because the court found there is no real dispute that towers *may* have a significant environmental impact,<sup>65</sup> it directed that the Commission address petitioners’ request for a programmatic EIS based on a less stringent threshold for NEPA analysis. Although petitioners had requested an EIS, the court stated that the Commission could initially prepare an EA in order to determine whether an EIS is required.<sup>66</sup>

<sup>59</sup> Forest Conservation Council, American Bird Conservancy, and Friends of the Earth, Petition for National Environmental Policy Act Compliance, submitted August 26, 2002 (Gulf Petition). The petition also raised several other issues as to which petitioners did not seek judicial review of the Commission’s decision, which are not discussed herein.

<sup>60</sup> In the Matter of Petition by Forest Conservation Council, American Bird Conservancy and Friends of the Earth for National Environmental Policy Act Compliance, *Memorandum Opinion and Order*, 21 FCC Rcd 4462 (2006) (*Gulf Memorandum Opinion and Order*).

<sup>61</sup> *Id.* at 4468 ¶ 18.

<sup>62</sup> *Id.* at 4465-66 ¶¶ 9-11 (citing the lack of specific evidence concerning the impact of towers on the human environment or of a scientific consensus regarding the impact of towers on migratory birds).

<sup>63</sup> *Id.* at 4467 ¶ 14 (noting petitioners’ failure to support generalized assertions of cumulative effects with concrete evidence).

<sup>64</sup> Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712.

<sup>65</sup> *American Bird Conservancy*, 516 F.3d at 1033 (citing 47 C.F.R. § 1.1307(c)).

<sup>66</sup> *Id.* at 1034.



24. Second, the court vacated the Commission's refusal to engage in programmatic consultation with FWS under the ESA. The court remanded the issue, holding that the Commission had failed to describe what kind of showing, short of petitioners conducting an EIS themselves, could demonstrate sufficient environmental effects to justify the programmatic consultation sought by petitioners.<sup>67</sup>

25. Third, the court ordered the Commission on remand to determine how it will provide notice of pending tower registration applications that will ensure meaningful public involvement in implementing NEPA procedures.<sup>68</sup> The court noted that while the Commission's rules permit interested persons to seek environmental review of a particular action otherwise categorically excluded from environmental processing,<sup>69</sup> its process confers "a hollow opportunity to participate in NEPA procedures" because "the Commission provides public notice of individual tower applications only *after* approving them ... [and] [i]nterested persons cannot request an EA for actions ... already completed."<sup>70</sup> The court noted the "suggest[ion] during oral argument that a simple solution would be for the Commission to update its website when it receives individual tower applications."<sup>71</sup>

#### D. Migratory Birds Rulemaking Proceeding

26. Meanwhile, the Commission had a related proceeding ongoing – the Migratory Birds rulemaking. On August 20, 2003, the Commission had issued the *Migratory Birds NOI* "to gather comment and information on the impact that communications towers may have on migratory birds."<sup>72</sup> While the Gulf Petition focused on the environmental effects of registered towers in the Gulf Coast region, particularly with respect to migratory birds, the *Migratory Birds NOI* (and the subsequent rulemaking notice) addressed the effects of communications towers on migratory birds nationwide. In response to the *Migratory Birds NOI*, the Commission received a number of comments and reply comments that referred to studies of past incidents of migratory birds colliding with communications towers. To help the Commission evaluate these studies, the Commission retained Avatar Environmental, LLC (Avatar), an environmental risk consulting firm. After reviewing the scientific studies referenced in the comments and reply comments, Avatar submitted a report of its findings (Avatar Report),<sup>73</sup> on which the Wireless Telecommunications Bureau sought comment.<sup>74</sup>

27. After reviewing the comments and the Avatar Report, the Commission in 2006 issued the *Migratory Birds NPRM* seeking comment on whether it should adopt regulations specifically for the

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<sup>67</sup> *Id.* at 1034-35.

<sup>68</sup> *Id.* at 1035.

<sup>69</sup> 47 C.F.R. § 1.1307(c).

<sup>70</sup> *American Bird Conservancy*, 516 F.3d at 1035.

<sup>71</sup> *Id.* at 1035.

<sup>72</sup> In the Matter of Effects of Communications Towers on Migratory Birds, *Notice of Inquiry*, WT Docket No. 03-187, 18 FCC Rcd 16938, 16938 ¶ 1 (2003) (*Migratory Birds NOI*).

<sup>73</sup> See Notice of Inquiry Comment Review Avian/Communication Tower Collisions, Final, Prepared for Federal Communications Commission, by Avatar Environmental, LLC, WT Docket No. 03-187 (filed December 10, 2004) (Avatar Report).

<sup>74</sup> Wireless Telecommunications Bureau Seeks Comment on Avatar Environmental, LLC, Report Regarding Migratory Bird Collisions with Communications Towers, *Public Notice*, WT Docket No. 03-187, *Public Notice*, 19 FCC Rcd 24007 (WTB 2004). See also Wireless Telecommunications Bureau Extends Period for Comment on Avatar Environmental, LLC, Report Regarding Migratory Bird Collisions with Communications Towers, WT Docket No. 03-187, *Public Notice*, 19 FCC Rcd 24778 (WTB 2004).



protection of migratory birds nationwide.<sup>75</sup> In particular, the Commission sought comment on scientific and technical issues relevant to the environmental effects of communications towers on migratory birds, on its authority and responsibility to adopt regulations specifically for the protection of migratory birds, and on what scientifically supported measures it could take to reduce any such impacts.<sup>76</sup> It tentatively concluded that its obligation, under NEPA, to identify and to take into account the environmental effects of actions that it undertakes may provide a basis for the Commission to make the requisite public interest determination under the Communications Act to support regulations specifically for the protection of migratory birds.<sup>77</sup> The Commission also tentatively concluded that, for communications towers subject to our Part 17 rules, the use of medium intensity white strobe lights for nighttime conspicuity (i.e., visibility) is to be considered the preferred system over red obstruction lighting systems to the maximum extent possible without compromising safety.<sup>78</sup> Finally, it specifically sought comment on whether to amend Section 1.1307(a) to routinely require environmental processing with respect to migratory birds and, if so, whether such revisions should apply to all new tower construction or only to antenna structures having certain physical characteristics deemed most problematic in terms of potential environmental impacts on migratory birds.<sup>79</sup>

28. The Commission received more than 2400 comments and reply comments in response to the *Migratory Birds NPRM*.<sup>80</sup> In this Order, we do not take final action in the Migratory Birds rulemaking, but rather defer such action until we are able to consider the results of the programmatic EA and any subsequent EIS. We do, however, consider the record in that proceeding in adopting an interim processing measure to reduce potential impacts on migratory birds pending completion of the environmental analysis.<sup>81</sup>

#### **E. The Rulemaking Petitions and the Memorandum of Understanding**

29. *Petitions for Expedited Rulemaking.* On May 2, 2008, CTIA – The Wireless Association, the National Association of Broadcasters, the National Association of Tower Erectors, and PCIA – The Wireless Infrastructure Association (the Infrastructure Coalition) filed the Infrastructure Coalition Petition.<sup>82</sup> The Infrastructure Coalition Petition asks the Commission to respond to the remand in

<sup>75</sup> In the Matter of Effects of Communications Towers on Migratory Birds, Notice of Proposed Rule Making, WT Docket No. 03-187, 21 FCC Rcd 13241 (2006) (*Migratory Birds NPRM*).

<sup>76</sup> *Id.* at 13256-60 ¶¶ 32-37.

<sup>77</sup> *Id.* at 13258 ¶ 33. See also In the Matter of Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality, *Report and Order*, FCC 85-626, 60 Rad. Reg. 2d (P&F) 13, 16 (1986) (“The primary purpose of this [NEPA] process is to ensure that agencies consider and balance with other public interest factors the environmental effects of the proposals before them.”); In the Matter of Amendment of Environmental Rules, Gen. Docket No. 88-387, *First Report and Order*, 5 FCC Rcd 2942, 2943 (1990) (“any delay in construction that results from requiring an applicant to undergo environmental processing prior to construction, rather than at the licensing stage, is more than offset by the public interest benefits of ensuring, in compliance with Federal environmental statutes, that no potentially irreversible harm to the environment occurs.”).

<sup>78</sup> *Migratory Birds NPRM*, 21 FCC Rcd at 13260-62 ¶¶ 38-42.

<sup>79</sup> *Id.* at 13268-69 ¶¶ 62-64.

<sup>80</sup> There were 94 major comments and 11 major reply comments from large and small licensees; tower construction companies; public safety organizations; federal, state, and local governments; environmental protection groups; and individuals. In addition, the Commission received more than 2,300 brief comments and reply comments from concerned citizens. The major commenters and the short forms by which they are cited are listed in Appendix B. Brief comments are not listed but are considered in this Order.

<sup>81</sup> See *infra*, Section III.B.

<sup>82</sup> On May 6, 2008, the Wireless Telecommunications Bureau (WTB) released a public notice seeking comment on the Infrastructure Coalition Petition. Wireless Telecommunications Bureau Seeks Comment on Petition for (continued....)



*American Bird Conservancy* by initiating a rulemaking to institute a notice, comment, and approval process for ASR applications modeled after the process for applications for assignments and transfers of authorizations. According to the Infrastructure Coalition, the assignment and transfer process rules were designed to minimize delays and reduce transaction costs, and these goals apply to processing ASR applications.<sup>83</sup> Further, the Infrastructure Coalition Petition asks the Commission to apply Section 1.939 of the Commission's rules,<sup>84</sup> which establishes criteria for filing a petition to deny, to objections to proposed ASR structures in order to prevent frivolous objections.<sup>85</sup>

30. Ten parties filed comments on the Infrastructure Coalition Petition.<sup>86</sup> Comments from communications providers and tower companies generally support the Infrastructure Coalition Petition, with some differences as to certain details.<sup>87</sup> These commenters assert that the Infrastructure Coalition's proposed rules reasonably balance the goals of rapid deployment of wireless infrastructure and public involvement, in compliance with the court's decision.<sup>88</sup> Commenters representing environmental protection groups, however, reject the rules and procedures proposed by the Infrastructure Coalition as not ensuring meaningful public involvement, and they ask for the cessation of registration of all antenna structures until the Commission complies with NEPA.<sup>89</sup>

31. On April 14, 2009, American Bird Conservancy, Defenders of Wildlife, and National Audubon Society (Conservation Groups) filed the Conservation Groups Petition.<sup>90</sup> The Conservation Groups Petition asks the Commission to adopt new rules on an expedited basis to comply with NEPA, the MBTA, and the court's mandate in *American Bird Conservancy*. It asks the Commission to: amend the NEPA regulations to ensure that only Commission actions that have no significant environmental effects individually or cumulatively are categorically excluded; prepare a programmatic EIS addressing the environmental consequences of its ASR program on migratory birds, their habitats, and the environment; promulgate rules to clarify the roles, responsibilities, and obligations of the Commission, applicants, and non-federal representatives in complying with the ESA; consult with FWS on the ASR program regarding all effects of antenna structures on endangered and threatened species; and complete the rulemaking in WT Docket No. 03-187 to adopt measures to reduce migratory bird deaths in compliance with the MBTA. Citing 12 sources by 14 authors, the Conservation Groups Petition argues that communications towers have impacts on migratory birds that are both demonstrable and avoidable. The Conservation Groups

(Continued from previous page)

Expedited Rulemaking of CTIA-The Wireless Association et al., for Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures For Processing Antenna Structure Registration, *Public Notice*, WT Docket No. 08-61, 23 FCC Rcd 7440 (WTB 2008).

<sup>83</sup> Infrastructure Coalition Petition at 7.

<sup>84</sup> 47 C.F.R. § 1.939.

<sup>85</sup> Infrastructure Coalition Petition at 2, 10, 12-13.

<sup>86</sup> The commenters and the short forms by which they are cited are listed in Appendix A.

<sup>87</sup> For example, Crown Castle proposes additional and alternative processes, including a different process for providing public notice. Infrastructure Coalition Petition Comments of Crown Castle at 5.

<sup>88</sup> See, e.g., Infrastructure Coalition Petition Comments of NTCA at 6; Infrastructure Coalition Petition Comments of USCC at 2; Infrastructure Coalition Petition Comments of Sprint Nextel at 3; Infrastructure Coalition Petition Comments of Verizon Wireless at 5.

<sup>89</sup> Infrastructure Coalition Petition Comments of Conservation Groups at 3.

<sup>90</sup> On April 29, 2009, the WTB released a public notice seeking comment on the Conservation Groups Petition. Wireless Telecommunications Bureau Seeks Comment on Petition for Expedited Rulemaking and Other Relief Filed On Behalf of American Bird Conservancy, Defenders of Wildlife and National Audubon Society Regarding Commission Implementation of the National Environmental Policy Act, the Endangered Species Act, and the Migratory Bird Treaty Act, *Public Notice*, WT Docket No. 08-61, 24 FCC Rcd 4881 (WTB 2009).



Petition also points out specific instances in which FWS has requested that the Commission undertake a programmatic EIS with regard to the ASR process or otherwise requested that the Commission take action to mitigate the impact of communications towers on migratory birds.

32. The Commission received 19 comments and four replies in response to the Conservation Groups Petition.<sup>91</sup> A group of organizations led by the New Jersey Audubon Society supports the Conservation Groups Petition and notes that CEQ regulations require an EA for federal actions except in limited circumstances.<sup>92</sup> Opponents of the Conservation Groups Petition argue that communications towers do not have a significant environmental impact on migratory birds, and they challenge the validity of the estimates and evidence submitted in the Conservation Groups Petition.<sup>93</sup> On reply, the Conservation Groups cite additional studies that they state establish a link between bird deaths and towers.<sup>94</sup>

33. *Memorandum Of Understanding.* On May 4, 2010, the Infrastructure Coalition and the Conservation Groups filed a Memorandum of Understanding (MOU) setting forth their joint proposal as to how the Commission could best fulfill its environmental responsibilities under NEPA with respect to towers during the interim period while it considers permanent rule changes to implement the court's decision in *American Bird Conservancy*. Under this joint proposal, ASR applications for new towers taller than 450 feet above ground level (AGL) would require an EA for avian effects and a public notice and an opportunity to comment. New towers of a height of 351 to 450 feet AGL or ASR applications involving a change of lighting system from a more preferred to a less preferred FAA Lighting Style would not initially require an EA based on avian concerns, but would be placed on public notice, and the Commission would determine, after reviewing the application and any comments filed in response to the public notice, whether to require an EA. Under the MOU, no EA would be required for ASR applications for new towers with a height of 350 feet AGL or less, replacement towers, minor applications, and lighting system changes from a less preferred to a more preferred FAA Lighting Style. The parties to the MOU are divided as to whether public notice should be required for these applications.

#### F. The Programmatic Environmental Assessment

34. As discussed above, in *American Bird Conservancy*, the court vacated the Commission's denial of the Gulf Petition's request for a programmatic EIS.<sup>95</sup> In compliance with the court's decision, Commission staff in September 2010 began work on a nationwide programmatic environmental assessment,<sup>96</sup> which will provide a comprehensive analysis upon which to base our consideration of the environmental effects of future proposed towers.<sup>97</sup> On August 26, 2011, the Wireless

<sup>91</sup> The commenters and short forms by which they are cited are listed in Appendix A.

<sup>92</sup> Conservation Groups Petition Comments of New Jersey Audubon Society *et al.* at 3. Other conservation organizations also filed in support of the American Bird Conservancy Petition.

<sup>93</sup> See, e.g. Conservation Groups Petition Comments of ASRI at 4; Conservation Groups Petition Comments of FWCC at 3-5; Conservation Groups Petition Comments of Verizon Wireless at 10-12; Conservation Groups Petition Comments of Maranatha at 2.

<sup>94</sup> Conservation Groups Reply Comments at 2-5.

<sup>95</sup> *American Bird Conservancy*, 516 F.3d at 1033. See *supra*, para. 23.

<sup>96</sup> The programmatic EA will cover the entire United States, not merely the Gulf Coast, because migratory bird pathways are dispersed throughout the continental United States, and because similar environmental effects may occur nationwide.

<sup>97</sup> See Federal Communications Commission Announces Public Meetings and Invites Comment on the Environmental Effects of its Antenna Structure Registration Program, *Public Notice*, WT Docket Nos. 08-61, 03-187, 25 FCC Rcd. 15953 (WTB 2010).



Telecommunications Bureau released and sought comments on a draft programmatic EA.<sup>98</sup>

35. The programmatic EA will provide the basis for the agency to determine whether an EIS is warranted.<sup>99</sup> The Commission will commence the preparation of a programmatic EIS if the programmatic EA demonstrates that “any ‘significant’ environmental impacts might result from the proposed agency action. . . .”<sup>100</sup> Otherwise, the Commission will make a Finding of no Significant Impact and will terminate the programmatic environmental review.<sup>101</sup> As set forth in the draft programmatic EA, in determining whether the programmatic EA supports a FONSI or whether an EIS is required, we will consider whether the evidence enables us to identify specific tower characteristics (e.g., tower height, structure, lighting, or location) that are likely to cause an adverse environmental impact on migratory birds, whether requiring site-specific environmental reviews for such towers would sufficiently address any adverse environmental impact that registered towers would otherwise have, and whether there are any other appropriate measures that may substantially mitigate and minimize any adverse environmental impacts.

36. In response to the court’s remand and in conjunction with the programmatic EA, the Commission also recently initiated programmatic consultation with FWS under Section 7(a)(1) of the ESA regarding the effects of registered towers on threatened and endangered species and designated or proposed critical habitats.<sup>102</sup> We already incorporate and implement in Section 1.1307(a) of our rules our responsibility, under Section 7 of the ESA, to ensure, in consultation with the Secretary of the Interior, that individual proposed Commission actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat of such species.<sup>103</sup> However, the court in *American Bird Conservancy* additionally required the Commission to address what environmental showing would require formal programmatic consultation

<sup>98</sup> Wireless Telecommunications Bureau Seeks Comment and Announces Public Meeting on its Draft Programmatic Environmental Assessment of the Antenna Structure Registration Program, *Public Notice*, WT Docket Nos. 08-61, 03-187, 26 FCC Rcd 13841 (WTB 2011). See also *id.* at Attachment, Draft Programmatic Environmental Assessment of the Antenna Structure Registration Program (Aug. 26, 2011) (Draft Programmatic EA).

<sup>99</sup> The court noted that we could commence our NEPA analysis through preparation of an EA. *American Bird Conservancy*, 516 F.3d at 1034. Commencing with a programmatic EA instead of a programmatic EIS is appropriate because our rules call for the preparation of an EIS for actions that are “deemed to have a significant effect upon the quality of the human environment.” 47 C.F.R. § 1.1305; see also 40 C.F.R. § 1501.3. Conflicting scientific evidence has been presented to us in the Migratory Birds proceeding regarding the environmental impact of communications towers on migratory birds. In these circumstances, we have yet to reach a definitive conclusion as to whether communications towers in fact have a “significant effect.”

<sup>100</sup> *American Bird Conservancy*, 516 F.3d at 1034 (citing *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphasis in original)).

<sup>101</sup> See 47 C.F.R. § 1.1308(d).

<sup>102</sup> Such incorporation of ESA considerations into the NEPA process is permitted under applicable laws. Section 7(c) of the Endangered Species Act provides that the Biological Assessment required to identify any endangered or threatened species likely to be affected by a proposed action “may be undertaken as part of a Federal agency’s compliance with the requirements of Section 102 of the National Environmental Policy Act of 1969.” 16 U.S.C. § 1536(c); see also 50 C.F.R. § 402.06 (Coordination with other environmental reviews). CEQ’s implementing regulations also encourage the incorporation into the NEPA process of other environmental reviews and consultation requirements. 40 C.F.R. §§ 1500.2(c), 1500.4(k), 1500.5(g).

<sup>103</sup> 47 C.F.R. § 1.1307(a)(3); see also 47 C.F.R. § 1.1308(b) Note (stating that the Commission will solicit and consider the comments of the Department of the Interior with respect to actions specified under Section 1.1307(a)(3)). Formal consultation with FWS is required if the action agency determines that a proposed action may affect protected species/habitats unless, as a result of preparing a biological assessment or through informal consultation, the action agency determines, and FWS concurs, that the proposed action is not likely to adversely affect any endangered or threatened species or their habitats. 50 C.F.R. §§ 402.13, 402.14.



with FWS over the cumulative effects of registered towers.<sup>104</sup> FWS recommended, and WTB agreed, to proceed by means of a conservation review under Section 7(a)(1).<sup>105</sup> Through this conservation review, FWS will evaluate the degree to which the ASR Program contributes to furthering the purposes of the ESA, and make possible recommendations to improve or enhance this contribution. The conservation review will also identify any subsequent formal consultation under Section 7(a)(2) that may be required for tower sites, either individually or in appropriate groupings. The conservation review will focus on procedures instituted at a programmatic level to promote the conservation of listed species and to avoid or minimize any adverse effects of the ASR program to these species or their habitats.

### III. DISCUSSION

37. Below, we first describe a new notice regime to afford members of the public an opportunity to comment on the environmental effects of prospective ASR applications. We then discuss an interim procedural requirement under which an EA will be filed for all proposed registered towers over 450 feet in height.

38. We have consulted with CEQ regarding these rules and procedures as required under CEQ's rules.<sup>106</sup> Under CEQ's rules, before adopting procedures implementing NEPA an agency must publish its proposed procedures in the Federal Register for comment, and CEQ must determine that the procedures conform with NEPA and CEQ's regulations.<sup>107</sup> In compliance with these rules, the Wireless Telecommunications Bureau issued a Public Notice inviting comment on the draft rules and interim procedures.<sup>108</sup> Thirteen formal comments were received in response to the *Draft Rules Public Notice*.<sup>109</sup> In addition, Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, on behalf of its affected clients, submitted a Petition for Reconsideration of the *Draft Rules Public Notice* (Blooston Commenters Petition).<sup>110</sup> We dismiss the Blooston Commenters Petition because the *Draft Rules Public Notice* is not

<sup>104</sup> *American Bird Conservancy*, 516 F.3d at 1035. Regulations governing interagency coordination do not delineate the circumstances in which a Federal agency must initiate "programmatic" formal Section 7 consultation beyond the general requirement to consider the effects of an action as a whole. 50 C.F.R. § 402.14(c)(6).

<sup>105</sup> 16 U.S.C. § 1536(a)(1). See Letter from Richard E. Sayers, Chief, Division of Consultation, HCPs, Recovery and State Grants, United States Department of the Interior, Fish and Wildlife Service to Aaron Goldschmidt, Assistant Division Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Division, FCC, dated May 3, 2011; Letter from Aaron Goldschmidt, Assistant Division Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Division, FCC to Richard E. Sayers, Chief, Division of Consultation, HCPs, Recovery and State Grants, United States Department of the Interior, Fish and Wildlife Service, dated June 1, 2011.

<sup>106</sup> 40 C.F.R. § 1507.3(a).

<sup>107</sup> 40 C.F.R. § 1506.6(a) (agencies shall "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures"); 40 C.F.R. § 1507.3(a) ("Each agency shall consult with [CEQ] while developing its procedures and before publishing them in the Federal Register for comment. ... The procedures shall be adopted only after an opportunity for public review and after review by [CEQ] for conformity with [NEPA] and [CEQ's] regulations.").

<sup>108</sup> Wireless Telecommunications Bureau Invites Comment on Draft Environmental Notice Requirements and Interim Procedures Affecting the Antenna Structure Registration Program, WT Docket Nos. 08-61, 03-187, *Public Notice*, 26 FCC Rcd. 4099 (WTB 2011) (*Draft Rules Public Notice*).

<sup>109</sup> A list of these commenters and short form references is attached hereto as Appendix C. DOI filed its comments on May 12, 2011, after the formal comment deadline. We accept the late-filed comments of DOI in the interest of a full record and so that we may benefit from the expertise of DOI. In addition, after the formal comment deadline, on May 6, 2011, Defenders of Wildlife submitted over 34,000 informal comments in support of the draft rules.

<sup>110</sup> The Infrastructure Coalition and Conservation Groups filed a Joint Opposition to the Petition for Reconsideration, and Blooston Commenters filed a Reply.



a final action subject to reconsideration.<sup>111</sup> Nevertheless, we treat the Blooston Commenters Petition as comments on the *Draft Rules Public Notice* and address its arguments below.<sup>112</sup>

39. Our final rules take into account the comments submitted in response to the *Draft Rules Public Notice*. None of the comments addresses the conformity of the environmental notice and interim processing rules with NEPA and CEQ's regulations. On August 1, 2011, CEQ advised that the rules we are adopting in this Order conform with NEPA and CEQ's regulations.

#### A. The Environmental Notification Process

40. In this Order, we adopt public notice rules and establish an environmental notification process so that members of the public have an early and well-defined avenue for raising environmental concerns. Under this process, a prospective applicant will initially submit a partially completed Form 854 for notification purposes, and the agency will address any environmental concerns that may be raised before a completed antenna structure registration application is filed with the Commission. We thereby provide a meaningful opportunity for interested parties to seek an EA for actions that do not ordinarily require an EA, as required by the court in *American Bird Conservancy*.

41. Under the process that we adopt today,<sup>113</sup> each prospective applicant for a new tower that requires antenna structure registration, or for a modification of a registered tower that is substantial enough to potentially have a significant environmental impact, must initially submit into the ASR system a partially completed FCC Form 854 that includes information about the proposed antenna structure but is not yet complete for filing. This will consist substantially of information that is already required on Form 854, augmented to include the type of tower structure and the anticipated lighting.<sup>114</sup> The applicant must also provide local notice of its proposed tower through publication in a local newspaper or other appropriate means, such as by following the local zoning public notice process. Applicants may provide local notice under both this process and the Commission's procedures implementing Section 106 of the National Historic Preservation Act (NHPA)<sup>115</sup> through a single publication.<sup>116</sup>

42. After local public notice has been provided, the Commission will post the partially completed FCC Form 854 on its ASR website in searchable form for 30 days. Members of the public will have an opportunity to file a request for further environmental review (Request) of the proposed tower during this 30-day period. Oppositions will be due 10 calendar days after expiration of the time for filing

<sup>111</sup> See 47 C.F.R. § 1.106(a)(1). Blooston Commenters argue that the *Draft Rules Public Notice* represents a final decision not to follow notice and comment procedures that it says are required under the Administrative Procedure Act (APA), 5 U.S.C. § 553, and Sections 1.412(a)(1) and 1.415(c) of the Commission's rules, 47 C.F.R. §§ 1.412(a)(1), 1.415(c). Blooston Commenters Reply at 3-4. However, the APA requires these procedures as a precondition for adopting certain rules. Since the *Draft Rules Public Notice* adopted no rules, it does not constitute a final action.

<sup>112</sup> See *infra*, paras. 45-46.

<sup>113</sup> The process is described in more detail in Appendix E. In addition, before the environmental notification process becomes operational, the Wireless Telecommunications Bureau will issue a Public Notice providing further details about this process.

<sup>114</sup> The revisions to FCC Form 854 to incorporate the environmental notification process are subject to approval by the Office of Management and Budget (OMB). The Wireless Telecommunications Bureau will issue a Public Notice announcing OMB's approval and the effective date of the process.

<sup>115</sup> 16 U.S.C. § 470f.

<sup>116</sup> See 47 C.F.R. Part 1, App. C, § V (specifying local notice requirements for review under the NHPA). Appendix E describes conditions that must be met to ensure that a single publication satisfies the notice requirements of our rules under both NEPA and the NHPA.



Requests. Replies will be due 5 business days after expiration of the time for filing oppositions. Oppositions and replies must be served on the parties to the proceeding.

43. Upon completion of the 30-day notice period, the Commission staff, after reviewing any Requests, will notify the applicant whether an EA is required under Section 1.1307(c) or (d) of our rules.<sup>117</sup> If no EA is required based on the partially completed Form 854 and any Requests, and if the applicant has determined that no EA is otherwise required under Section 1.1307(a) or (b), it may then update and file Form 854 certifying that the tower will have no significant environmental impact.<sup>118</sup> At this point, if all other required information has been provided, the Form 854 will be deemed complete and can be processed accordingly.

44. In addition, after the effective date of these rules, the pre-application process will also become the procedural vehicle for filing and reviewing EAs for registered towers that require an EA. The applicant either may include an EA when it first initiates the environmental notification process if it has determined that the tower meets one of the criteria set forth in Section 1.1307(a) or (b) of the rules, or it may subsequently submit an EA if the applicant or the Commission later determines that an EA is necessary. The EA will then be posted on the ASR website, and members of the public will have the opportunity to object in much the same manner as they can file petitions to deny ASR applications filed with EAs today. However, local notice will be required only once for any tower unless there is a change in location, significant increase in height, or other change in parameters that may cause the tower to have a greater environmental impact. After considering the EA and any Requests, the Commission will either issue a FONSI, require amendments to the EA, or determine that an EIS is needed. Upon issuance of a FONSI, the applicant may complete the Form 854 filing and certify no significant environmental impact.

45. We take these actions pursuant to the Commission's "wide discretion in fashioning its own procedures" to implement its environmental obligations.<sup>119</sup> Because we are only changing our procedures governing the submission of certain applications, these rule changes qualify for the procedural exception to the APA's requirements of notice and an opportunity for public comment.<sup>120</sup> For the same reason, the rules and interim procedures adopted herein do not require the preparation of a Regulatory

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<sup>117</sup> We recognize that cases may arise that involve emergency situations, such as where temporary towers need to be built quickly to restore lost communications. Such situations often require grants of special temporary authority (STAs). In such cases, upon an appropriate showing and at the request of the applicant, the processing Bureau may waive or postpone this notice requirement. The Bureau shall ordinarily require in such cases that notice be provided within a short period after authorization or construction, unless the Bureau concludes in a particular case that provision of such notice would be impracticable or not in the public interest. In appropriate circumstances, where a temporary facility constructed in an emergency situation will be replaced by a permanent tower, environmental notification for the temporary and permanent towers may be combined.

<sup>118</sup> Applications for which no environmental assessment is required are categorically excluded from environmental processing. See 47 C.F.R. § 1.1306(a) ("Except as provided in § 1.1307(c) and (d), Commission actions not covered by § 1.1307(a) and (b) are deemed individually and cumulatively to have no significant effect on the quality of the human environment and are categorically excluded from environmental processing."); 47 C.F.R. § 1.1307 (a), (b) (identifying actions that may have an environmental effect for which Environmental Assessments must be prepared); 47 C.F.R. § 1.1307(c), (d) (specifying procedure for requiring an EA for particular actions otherwise categorically excluded).

<sup>119</sup> *American Bird Conservancy*, 516 F.3d at 1035 (quoting *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 664 (D.C. Cir. 1984)).

<sup>120</sup> 5 U.S.C. § 553(b)(A) (providing an exception for "rules of agency ... procedure" to the requirement that federal agencies prior to the adoption of a rule must provide the public with notice and the opportunity to comment). Although the Wireless Telecommunications Bureau issued a Public Notice in this proceeding to invite comment on draft rules and interim procedures, and that Public Notice was published in the Federal Register, 76 Fed. Reg. 18679 (April 5, 2011), it was issued pursuant to CEQ's rules, see *supra*, para. 38, and was not required under the APA.



Flexibility Analysis pursuant to the Regulatory Flexibility Act (RFA).<sup>121</sup> “[T]he ‘critical feature’ of the procedural exception ‘is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.’”<sup>122</sup> In other words, whether or not a rule has a “‘substantial impact,’”<sup>123</sup> it qualifies for the procedural exception where, as here, it does not “‘purport to regulate or limit [parties’] substantive rights.’”<sup>124</sup> For example, in *JEM Broadcasting Co.*, the Court of Appeals held that the Commission’s “hard look” rules requiring dismissal of defective applications after the expiration of a fixed filing period with no opportunity to amend were procedural rules that were exempt from the notice and comment requirements because the rules “did not change the *substantive standards* by which the FCC evaluates license applications.”<sup>125</sup>

46. Like the “hard look” rules in *JEM Broadcasting Co.*, the public notice rules adopted in this order govern the processing of certain types of applications without affecting the substantive standards by which those applications are evaluated. The public notice rules do not “put[] a stamp of [agency] approval or disapproval on a given type of behavior”<sup>126</sup> or “encode[] a substantive value judgment.”<sup>127</sup> Instead, they merely require a tower proponent to notify the Commission and the local community of information about its proposal in advance of filing the completed ASR application with the Commission. The tower proponent will do so by submitting a partially completed ASR application consisting mostly of information that is already required on the existing Form 854.<sup>128</sup> Although Blooston Commenters and NTCA state that the draft rules afford third parties new substantive rights to receive notice of ASR applications and to request further environmental processing,<sup>129</sup> the right of the public to request environmental processing is already established in the Commission’s rules. The notice requirements that we adopt only enable members of the public more fully to exercise their existing rights of participation, consistent with the D.C. Circuit’s opinion in *American Bird Conservancy*.<sup>130</sup>

<sup>121</sup> The RFA requirement to prepare a Regulatory Flexibility Analysis applies only to rules for which notice and comment rulemaking is required under Section 553(b) of the APA. 5 U.S.C. § 604(a) (“When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, ... the agency shall prepare a final regulatory flexibility analysis.”).

<sup>122</sup> *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (quoting *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)). See also *James V. Hurson Associates, Inc. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000). Accord *Chamber of Commerce of United States v. United States Dep’t of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999).

<sup>123</sup> *Public Citizen v. Dep’t of State*, 276 F.3d 634, 640 (D.C. Cir. 2002) (quoting *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987)).

<sup>124</sup> *James V. Hurson Associates, Inc. v. Glickman*, 229 F.3d at 281 (quoting *National Whistleblower Center v. Nuclear Regulatory Comm’n*, 208 F.3d 256, 262 (D.C. Cir. 2000), cert. denied, 531 U.S. 1070 (2001)).

<sup>125</sup> *JEM Broadcasting Co. v. FCC*, 22 F.3d at 327 (emphasis in original).

<sup>126</sup> *Chamber of Commerce of U.S. v. U.S. Dep’t of Labor*, 174 F.3d at 211 (quoting *Am. Hosp. Ass’n v. Bowen*, 834 F.2d at 1047).

<sup>127</sup> *Public Citizen v. Dep’t of State*, 276 F.3d at 640 (quoting *Am. Hosp. Ass’n v. Bowen*, 834 F.2d at 1047).

<sup>128</sup> In the case where an environmental notification has an EA attached, the information is substantially the same as currently required for EAs filed with ASR applications.

<sup>129</sup> Blooston Commenters Petition at 3-5; Draft Rules Public Notice Comments of NTCA at 4-6.

<sup>130</sup> For similar reasons, we reject Blooston Commenters’ argument that notice and comment rulemaking, including an opportunity to file reply comments, is required under Sections 1.412(a)(1) and 1.415(c) of the Commission’s rules. 47 C.F.R. §§ 1.412(a)(1), 1.415(c); see Blooston Commenters Petition at 6-8. Section 1.412(b)(5) of the rules expressly states: “Rule changes (including adoption, amendment, or repeal of a rule or rules) relating to the (continued...) ”



47. We also note that the record in this proceeding includes two petitions for expedited rulemaking, numerous pleadings in response to two Public Notices seeking comment on the two petitions, and several *ex parte* filings. In addition, in the *Draft Rules Public Notice*, the Wireless Telecommunications Bureau invited and received public comment on draft rules and interim procedures in this proceeding, as required by CEQ's rules.<sup>131</sup> As under the APA's notice-and-comment procedures, parties have had a full opportunity to participate in our decision-making process. Furthermore, we take the suggestions in the petitions, as well other filings in this proceeding, into account in this Order.

48. In this Section, we begin by setting out the actions subject to the new environmental notification process. Second, we discuss the timing of the environmental notification process. Third, we explain our decision to require both local and national notice. Fourth, we discuss the timing and pleading standards governing Requests for further environmental review. Fifth, we discuss applications that require a service-specific application in addition to FCC Form 854. Finally, we discuss the treatment of applications that are pending on the effective date of the new environmental notification rules and procedures. The environmental notification process is discussed in more detail in Appendix E.

### 1. Actions Subject to Notice

49. *National applicability.* The environmental notification process adopted herein will apply throughout the nation regardless of the geographic location of the proposed antenna structure for which an ASR application must be filed. Although the Gulf Petition and the court's resulting decision applied specifically to communications towers in the Gulf Coast region,<sup>132</sup> the logic of the court's analysis, which hinged on the Commission's failure to provide public notice prior to grant of pending ASR applications, is not confined to that region. The concern that the current notice regime effectively deprives interested persons of the opportunity conferred by Section 1.1307(c) encompasses any proposed tower (and some types of modifications to an existing tower) that is subject to registration under the Commission's Part 17 rules. We find no basis to limit the environmental notification process adopted herein to the Gulf Coast towers at issue in the court case.<sup>133</sup>

50. *Types of actions subject to notice.* Under the new environmental notification process, notice will be required for new towers and modifications that could have a significant environmental impact, but not for administrative changes and modifications that are unlikely to have a significant environmental impact. The environmental notification process is necessary to effectuate fully the opportunity conferred by Section 1.1307(c) for interested persons to allege that an EA should be prepared for an otherwise categorically excluded ASR application due to "circumstances necessitating environmental consideration in the decision-making process." The notice provided through this process also serves to facilitate meaningful public participation in the NEPA process for proposed towers that require an EA. The environmental notification process must therefore be completed for all types of ASR applications that could potentially have a significant environmental impact.

(Continued from previous page)

following matters will ordinarily be adopted without prior notice: ... (5) Rules of Commission organization, procedure, or practice." 47 C.F.R. § 1.412(b)(5). As discussed above, the rule changes adopted in this Order relate to matters of Commission procedure, and the Wireless Telecommunications Bureau sought comment on draft rules not due to APA requirements, but to comply with Section 1507.3 of CEQ's rules. Therefore, these rule changes are outside the scope of Section 1.412(a)(1) as well as Section 1.415.

<sup>131</sup> See *supra*, para. 38.

<sup>132</sup> *American Bird Conservancy*, 516 F.3d at 1031; see *Gulf Memorandum and Opinion Order*, 21 FCC Rcd at 4468 ¶ 18 (noting that petitioners sought, with respect to notice, "notice and opportunity to comment on all antenna structure registration applications the FCC is contemplating in the Gulf Coast region, regardless of whether the FCC believes these decisions are categorically excluded from NEPA review").

<sup>133</sup> No party has suggested that applicability of the notification process should be limited to the Gulf Coast region. The Infrastructure Coalition proposed amending the Commission's rules for all ASR applications, and made no distinction between towers within and outside the Gulf Coast region. See, e.g., Infrastructure Coalition Petition at 1.



51. Consistent with this principle, we apply the environmental notification process to all ASR applications for new towers (except as described in paragraph 56, *infra*). We reject the Infrastructure Coalition's proposal not to require public notice for an ASR application for a tower 350 feet or less in height for which the applicant believes an EA is not required, as well as other suggestions to exclude towers from the notice requirement based on their height or lack of lighting.<sup>134</sup> While we recognize that shorter towers are less likely to have significant environmental effects, including effects on migratory birds, than taller towers, nothing in the court's opinion, NEPA, or CEQ's implementing rules would support dispensing with public notice, even on an interim basis, for any ASR action that reasonably might have a significant environmental impact.<sup>135</sup> Based on currently available evidence, we cannot ignore the possibility that a registered tower over 200 feet in height, or a tower under 200 feet that requires FAA notification, may have a significant environmental impact that is not otherwise captured in our rules. We therefore apply the environmental notification requirement to registered towers under 350 feet in height.<sup>136</sup> Although we decide that such towers will be placed on public notice, we contemplate that a particularly clear showing would be required to demonstrate that such towers may have effects on migratory birds.

52. FCC Forms 854 that are submitted for purely administrative purposes or to report modifications of a nature that do not have a potentially significant environmental effect will not be subject to the environmental notification process. Thus, where an applicant is required to submit an FCC Form 854 only for notification purposes, such as to report a change in ownership or contact information, the dismantlement of a registered tower, tower repair, replacement of tower parts, or any modification that does not involve the physical structure, lighting, or geographic location of a registered antenna structure, the applicant will not have to complete the environmental notification process prior to submitting the Form 854.<sup>137</sup> Instead, the applicant will be able to indicate that it is submitting the application form only to effect an administrative change or notification, for which the pre-application environmental notification process is not required.

53. In the case of replacement towers or modifications to existing towers, including collocations on existing towers or other structures, the applicability of the environmental notification process will depend upon the nature of any change to the existing structure. The MOU defines a Replacement Tower for which public notice should not be required as a communications tower the construction of which does not involve a substantial increase in size to the tower it is replacing, as defined in Section III.B. of the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (NPA),<sup>138</sup> or

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<sup>134</sup> See, e.g., *Draft Rules Public Notice* Comments of Southern at 8-9 (exempt towers less than 200 feet in height AGL); *Draft Rules Public Notice* Comments of NextG at 2-3, 8-9 (exempt unlit towers); *Draft Rules Public Notice* Comments of Verizon Wireless at 2, 4-5 (exempt unlit towers less than 200 feet in height AGL); *Draft Rules Public Notice* Comments of NTCH at 7 (exempt voluntary registrations).

<sup>135</sup> See *American Bird Conservancy*, 516 F.3d at 1035.

<sup>136</sup> For similar reasons, we also decline to adopt exemptions for facilities used in connection with distributed antenna system (DAS) networks that otherwise require registration, see *Draft Rules Public Notice* Comments of NextG at 2-3, 6-8, or for state-owned towers under 450 feet in height AGL that are used for public safety purposes, see *Draft Rules Public Notice* Comments of Virginia State Police at 2-3. While Virginia State Police suggests security concerns about identifying the specific locations of such towers, we note that the coordinates of these towers are public information in the ASR database and that local notice of these proposed towers is already required for purposes of NHPA compliance under the Nationwide Programmatic Agreement, 47 C.F.R. Pt. 1, App. C, §§ V.B., V.C. No commenter expresses concern about those existing disclosures.

<sup>137</sup> See MOU, §§ I.A.2, II.A.3, II.B.3.

<sup>138</sup> 47 C.F.R. Pt. 1, App. C, § III.B.



construction or excavation more than 30 feet beyond the existing tower property.<sup>139</sup> Consistent with this recommendation, as an interim measure pending completion of our programmatic environmental analysis, we will not require the environmental notification process for any replacement tower at the same location as an existing tower,<sup>140</sup> not involving a change in lighting, so long as it does not involve a substantial increase in size under Section III.B of the NPA<sup>141</sup> or construction or excavation more than 30 feet beyond the tower property. Similarly, we will not require notice where an antenna is being placed on an existing tower or non-tower structure and the placement of the antenna does not involve a substantial increase in size or excavation more than 30 feet beyond the property. If a proposed tower replaces another tower but involves a substantial increase in size or construction or excavation more than thirty feet beyond the tower property, it is not exempted from the environmental notification process as a replacement tower. Additionally, where an EA is required to be filed for a replacement tower under Section 1.1307(a) or (b) of the Commission's rules or if the Bureau determines that an EA is required under Section 1.1307(c) or (d) of the Commission's rules, such a tower is not exempted from the environmental notification process.

54. The notice regime for ASR applications that involve changes in lighting to existing towers or replacement towers will depend on the nature of the lighting change. The parties to the MOU developed a ranking of FAA Lighting Styles based on their likely effect on migratory birds and recommended that public notice be required for a change to a less preferred but not to a more preferred FAA Lighting Style.<sup>142</sup> However, recommendations from DOI and FWS based on recent scientific literature strongly suggest that L-810 steady-burning red lights pose the greatest danger of migratory bird mortality and that the differences among styles of flashing or blinking lights are not statistically significant.<sup>143</sup> At least one signatory to the MOU recommends that the Commission verify the continuing accuracy of the order of tower lighting styles specified in the MOU.<sup>144</sup> Furthermore, the FAA may soon consider changes to Advisory Circular AC 70/7460 that would permit use of red flashing or blinking

<sup>139</sup> See MOU, § I.A.1.

<sup>140</sup> We note that changes in longitude or latitude of less than one second do not require a new aeronautical study with an FAA determination. See *In the Matter of Streamlining the Commission's Antenna Structure Clearance Procedure, Report and Order*, WT Docket No. 95-5, 11 FCC Rcd 4272, 4287, ¶ 35 (1995). Consequently, we consider a replacement tower located less than one second longitude and latitude from an existing tower to be at the same location.

<sup>141</sup> A substantial increase in size occurs under the NPA if: (1) the mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed these size limits if necessary to avoid interference with existing antennas; or (2) the mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or (3) the mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed these size limits if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable. NPA, § III.B; see *Nationwide Agreement for the Collocation of Wireless Antennas*, 47 C.F.R. Pt. 1, App. B, § I.C.

<sup>142</sup> MOU, § I.A.4 and Attachment 1.

<sup>143</sup> See *Draft Rules Public Notice* Comments of DOI at 3 and evidence cited therein; Comments of Division of Migratory Bird Management, U.S. Fish and Wildlife Service, submitted in WT Docket Nos. 08-61 & 03-187, January 14, 2011, at 7-8. Therefore, we decline to base decisions regarding environmental processing on whether red or white lights are used. See *Draft Rules Public Notice* Comments of Blooston Commenters at 5, 10-12. There is insufficient evidence in the record that the color of lighting is a critical factor in determining avian mortality.

<sup>144</sup> See *Draft Rules Public Notice* Comments of Conservation Groups at 2.



lights without steady-burning L-810s.<sup>145</sup> In these circumstances,<sup>146</sup> pending completion of our programmatic environmental analysis, we will replace the ranking of FAA Lighting Styles in the MOU with a three-tiered system, which ranks styles from most preferred to least depending on whether they employ: (1) no lights; (2) no red steady lights; or (3) red steady lights.<sup>147</sup> The environmental notification process will not be required where the lighting is changed to a lighting style that is more preferred or within the same tier of this ranking system,<sup>148</sup> but will be required where the lighting is changed to a less preferred lighting style.<sup>149</sup>

55. Where information pertaining to a prospective antenna structure registration is amended after environmental notification but prior to grant of an ASR application, we generally will require a new environmental notification only if the amendment is of a nature that would have required environmental notification in the context of an application for replacement or modification of an existing tower. To prevent abuse, however, we will require the applicant to provide a new environmental notification to the public for any amendment that increases the proposed tower height, even if it does not constitute a substantial increase in size.

56. *Exception for certain towers reviewed by other federal agencies.* We provide a very limited exemption from the environmental notification process for antenna structures to be located on federal land. CEQ regulations provide for the designation of a lead agency and one or more cooperating agencies when more than one federal agency is involved in a proposed action.<sup>150</sup> Consistent with these regulations, Section 1.1311(e) of the Commission's rules provides that an EA need not be submitted to the Commission if another federal agency has assumed responsibility for determining whether the facility will have a significant environmental effect and, if it will, for invoking the EIS process.<sup>151</sup> For example, if a proposed facility that requires registration in the ASR system is to be located on federal land, the landholding agency ordinarily functions as the lead agency and the Commission does not perform an environmental review except as necessary to ensure that the EA prepared by the lead agency satisfies the Commission's responsibility. We caution that the exemption is limited in scope only to towers located on federal land, for which the landholding agency routinely assumes lead agency responsibilities. The exemption will not routinely apply in other situations where proposed antenna structures must secure

<sup>145</sup> See *Draft Rules Public Notice* Comments of DOI at 3.

<sup>146</sup> See *Draft Rules Public Notice* Comments of Conservation Groups at 2 (asking that final rule acknowledge that the FAA may revise its lighting styles and noting the need for a revision of the ranking order if new FAA standards are implemented).

<sup>147</sup> See *Draft Rules Public Notice* Comments of DOI at 3, 7-8. The ranking focuses on use of red steady lights because none of the FAA Lighting Styles use white steady lights, only white medium intensity or high intensity flashing lights.

<sup>148</sup> FAA Lighting Styles include several lighting configurations that use white flashing lights without red steady lights as well as several configurations that include red steady and flashing lights. Any FAA Lighting Style that does not use red steady lights falls within the second tier (*i.e.*, less preferred than no lights), and any FAA Lighting Style that uses red steady lights falls within the third, least preferred tier.

<sup>149</sup> As recognized in the MOU, any change in lighting must be consistent with the applicable version of FAA Advisory Circular AC 70/7460, FAA policies, and local zoning requirements, whether the change is to a less preferred lighting style or to a more preferred lighting style. See MOU, § I(A)(4) and Attachment 1. Furthermore, use of high intensity white lights in a residentially zoned neighborhood requires an EA under our existing rules. 47 C.F.R. § 1.1307(a)(8).

<sup>150</sup> See 40 C.F.R. § 1508.16 (lead agency) and 40 C.F.R. § 1508.5 (cooperating agency).

<sup>151</sup> 47 C.F.R. § 1.1311(e).

environmental clearance from other federal agencies.<sup>152</sup> In those circumstances, we cannot assume the other agency to be the lead agency. Rather, as part of the process of reviewing a Request filed in response to the pre-application public notice, we will consider whether ongoing NEPA review of the proposed antenna structure by another federal agency relieves the applicant of having to submit an EA to the Commission under Section 1.1311(e). We delegate to the Wireless Telecommunications Bureau authority to enter into agreements with other federal agencies that would designate the other agency as the lead agency for specified categories of actions and thereby obviate the need for our environmental notification process.

57. *Limitation to towers subject to antenna structure registration.* We clarify that the environmental notification process will be applicable only to towers that are registered pursuant to Part 17 of our rules, including towers constructed by non-licensee tower companies that do not require FAA notification but that are registered as the vehicle for filing an EA.<sup>153</sup> We note, however, that towers that are not subject to registration under Part 17 of the rules must comply with the Commission's environmental rules. Objections based on environmental considerations to such non-ASR applications remain subject to the petition to deny standard specified in Section 1.1313(a).<sup>154</sup> We will also continue to entertain informal objections to such construction based on environmental considerations pursuant to Section 1.1313(b).<sup>155</sup>

## 2. Timing of Environmental Notice

58. Applicants will be required to complete environmental notification before filing their completed ASR applications, and may do so before receiving the FAA's No Hazard Determination.<sup>156</sup> Thus, the environmental notification process constitutes a notification, not a certification, and submission of the partially completed Form 854 without an EA is not a representation to the Commission that the tower will have no significant environmental effects.<sup>157</sup> Completing the pre-ASR filing environmental notification process as an initial step before a complete ASR application can be filed with the Commission ensures that interested persons have a timely opportunity to participate in a manner that can inform the Commission's decision-making with respect to an individual ASR application. This is also consistent with Section 1501.2 of the CEQ regulations, which generally directs that the federal agency commence the NEPA process as early as possible and before there has been any inadvertent, irretrievable

<sup>152</sup> We decline to adopt an exemption from notice requirements for towers that have already been reviewed by FWS, as requested by Verizon Wireless in its *Draft Rules Public Notice* Comments at 2, 7. The Commission's environmental notification process and environmental processing are not limited to concerns that would be addressed by FWS.

<sup>153</sup> See *supra*, para. 18.

<sup>154</sup> 47 C.F.R. § 1.1313(a).

<sup>155</sup> See 47 C.F.R. § 1.1313(b). See also *In the Matter of Application of American Tower Corporation for Tower Registration With Environmental Assessment, Memorandum Opinion and Order*, 21 FCC Rcd 1680, 1685 ¶ 14 (WTB Spectrum & Comp. Policy Div. 2006) (dismissing improperly filed petitions to deny but addressing the merits of environmental objections); *In the Matter of County of Albemarle Informal Objections Against Application for Wireless Radio Station Authorization (FCC Form 601) With Environmental Assessment, Memorandum Opinion and Order*, 18 FCC Rcd 10647, 10651 ¶ 14 (WTB Comm. Wireless Div. 2003) (same); *In the Matter of Application of AT&T Wireless PCS Inc., Memorandum Opinion and Order*, 14 FCC Rcd 9489, 9494-95 ¶ 8 & n.37 (WTB Enf. & Cons. Info. Div. 1999) (treating environmental objections that do not conform to the procedures for petitions to deny as informal objections).

<sup>156</sup> A prospective applicant that submits its environmental notification information before receiving a No Hazard Determination should specify the lighting that it expects will be prescribed for the tower. In the event the FAA specifies a less preferred lighting style, it will have to provide a second notice with the corrected information.

<sup>157</sup> This certification will be required when the environmental notification process is complete and the applicant files its completed FCC Form 854.



commitment of resources.<sup>158</sup> Earlier completion of the notification process further serves the public interest because it requires less change to the automated ASR system, upon which the FAA currently relies to ensure air navigation safety, and that has operated for more than a decade efficiently and without material error. Moreover, from a processing standpoint, applicants can complete the notice process simultaneously with other processes, including environmental reviews that may require consultation with other federal agencies, obtaining the FAA No Hazard Determination, and local zoning. Therefore, the environmental notification process will not ordinarily cause additional delays unless environmental issues are raised.

59. In addition, under the new process EAs for proposed registered towers will be submitted with a partially completed Form 854, made available for public comment, and reviewed prior to filing of the ASR application.<sup>159</sup> Accordingly, the 30-day comment period will be announced on the Commission's ASR website instead of through a notice published in the *Daily Digest*.<sup>160</sup> Otherwise, the processing of EAs for registered towers will be substantially the same as today. Because the environmental notification process we adopt today expressly seeks environmental comments and provides pertinent details of the proposed tower, it makes it easier for interested members of the public to access pertinent information about an EA, and thus better comports with the objectives underlying NEPA than the non-specific Public Notices that currently are published in the *Daily Digest*. Moreover, apart from encouraging public involvement, a uniform system of environmental processing for all ASR applications, whether or not EAs are required pursuant to Section 1.1307(a) or (b), will be easier for the Commission to administer and less confusing to applicants.

### 3. National and Local Notice

60. We require both national and local notice for towers that must be registered in the ASR system in order fully to inform all parties that may be interested in or affected by the environmental consequences of a proposed tower. We recognize that the environmental effects of a specific proposed tower construction may be of national concern, of local concern, or of both national and local concern. Conservation groups and some industry parties have urged that the Commission adopt national notice,<sup>161</sup> while other industry commenters have suggested that we adopt local notice.<sup>162</sup> Their reasons in favor of one approach or another are discussed here, but in effect those reasons support using both forms of notice.

61. National notice provided online at the Commission's website was an approach suggested

<sup>158</sup> 40 C.F.R. § 1501.2(d)(3) ("Federal agencies shall ... provide for cases where actions are planned by private applicants ... so that [t]he Federal agency commences its NEPA process at the earliest possible time.").

<sup>159</sup> The Commission "enjoys wide discretion in fashioning its own procedures." *Global Crossing Telecommunications, Inc. v. FCC*, 259 F.3d 740, 748 (D.C. Cir. 2001) (quoting *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 664 (D.C. Cir. 1984)). See 47 U.S.C. §§ 154(i), 154(j); *FCC v. Schreiber*, 381 U.S. 279, 289 (1965). See also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 524-25 (1978). We act within that broad discretion in applying uniform environmental notification procedures to our processing of all ASR applications as a means of fulfilling our responsibility to make "diligent efforts to involve the public" in our implementation of NEPA. 40 C.F.R. § 1506.6(a).

<sup>160</sup> To avoid any confusion, for an initial period of six months, we will place a note in the *Daily Digest* weekly advising that notice of all proposed registered towers, along with any associated EA, is now provided on the Commission's ASR website.

<sup>161</sup> See, e.g. Infrastructure Coalition Petition Comments of Conservation Groups at 3; Infrastructure Coalition Petition at 6-10; Infrastructure Coalition Petition Comments of Verizon Wireless at 3; Infrastructure Coalition Petition Comments of Sprint Nextel at 3; Infrastructure Coalition Petition Comments of APCO at 4. See also *Draft Rules Public Notice* Comments of Virginia State Police at 5; *Draft Rules Public Notice* Comments of Blooston Commenters at iii, 6-7; *Draft Rules Public Notice* Comments of NTCH at 3; *Draft Rules Public Notice* Comments of Southern at 4-5.

<sup>162</sup> See Infrastructure Coalition Petition Comments of Crown Castle at 10.



by the court.<sup>163</sup> We find that the ASR website is an efficient, efficacious means of providing notice to agencies and persons outside of the local community, including national environmental groups, that may have regional or national perspectives as to the environmental values of proposed antenna structures. In particular, national notice will aid in informing bird watchers who are not located near a proposed tower but who may be affected by the harm it would cause to migrating birds, given that migratory birds are by definition transient.<sup>164</sup> The web-based process that we are creating will provide national accessibility, result in the creation of an electronic database, and reduce the potential for human error and application backlogs.<sup>165</sup>

62. Local notice complements the broad reach of national notice by enabling persons likely to be directly affected by the potential environmental effects of proposed antenna structures at specific locations to raise concerns of which national entities may not be aware. It also reaches those persons or entities without an institutional concern in safeguarding a particular aspect of the environment but with a potential interest in the effects of tower sitings in their immediate communities. The Commission has successfully implemented local notice for historic preservation review and for radio broadcast applications, and the local notice requirements we promulgate today are modeled after those regimes.<sup>166</sup>

63. We find that by requiring both local and national notice, we can best meet our statutory responsibility regarding the development of procedures that incorporate environmental considerations into agency decision-making.<sup>167</sup> In particular, these requirements effectuate the mandate of Section 1506.6(b) of the CEQ regulations that federal agencies shall “provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies that may be interested or affected.”<sup>168</sup> CEQ has further clarified that “[t]he objective is to notify all interested or affected parties,” and that “[a] combination of methods may be used to give notice.”<sup>169</sup> In

<sup>163</sup> See *American Bird Conservancy*, 516 F.3d at 1035.

<sup>164</sup> This broadly inclusive approach to notice and comment for NEPA purposes before a complete application is filed is not necessarily determinative of which individuals and/or agencies will have standing to participate in proceedings relating to that application. A variety of factors, including the environmental concern in question, will factor into that analysis. See, e.g., 47 C.F.R. § 1.939(a) (requiring status as a “party in interest” in order to file a petition to deny an application in the Wireless Radio Services); *In the Matter of Wahpeton School District, Order on Reconsideration*, 25 FCC Rcd 5806, 5808 ¶ 8 (WTB Broadband Div. 2010) (To establish party in interest standing, a petitioner must allege facts sufficient to demonstrate that grant of the subject application would cause it to suffer a direct injury. In addition, a petitioner must demonstrate a causal link between the claimed injury and the challenged action.).

<sup>165</sup> Southern suggests that instead of requiring applicants to submit a preliminary Form 854 to commence the environmental notification process, the FCC should provide a link to the FAA’s website so that interested parties can review the information available on the FAA website and file any petitions based on that information. *Draft Rules Public Notice Comments of Southern* at 5. We decline to adopt this suggestion. Southern has failed to demonstrate that a link to the FAA’s information about towers submitted for aeronautical study is a practical means of providing the public sufficient notice regarding proposed towers, in a manner that can be accessed easily and understood by the public.

<sup>166</sup> See 47 C.F.R. Pt. 1, App. C, §§ V.B, V.C; 47 C.F.R. §§ 73.3580(b), (f). The details of the local notice requirement are described *infra*, in Appendix E.

<sup>167</sup> 42 U.S.C. § 4331(b) (providing that it is the continuing responsibility of the Federal Government to use all means practicable to facilitate national environmental policy); 42 U.S.C. § 4332(2)(B) (directing all Federal agencies to “identify and develop methods and procedures ... which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations”).

<sup>168</sup> 40 C.F.R. § 1506.6(b).

<sup>169</sup> *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026-01 (Mar. 23, 1981) at Question 38. Although CEQ’s guidance does not identify notifications of proposed (continued....)